

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

NATIONAL WILDLIFE FEDERATION,

Plaintiff,

v.

FEDERAL EMERGENCY  
MANAGEMENT AGENCY,

Defendant,

THE CITIES OF ARLINGTON,  
AUBURN, BURLINGTON, EVERETT,  
FEDERAL WAY, KENT, LAKE  
FOREST PARK, MOUNT VERNON,  
NORTH BEND, ORTIN, PORT  
ANGELES, PURALLUP, RENTON,  
SNOQUALMIE, SULTAN, and  
TUKWILA,

Defendant-Intervenors,

PROPERTY OWNERS FOR SENSIBLE  
FLOODPLAIN REGULATION,

Defendant-Intervenor.

CASE NO. C11-2044-RSM

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT FEDERAL  
EMERGENCY MANAGEMENT  
AGENCY'S MOTION FOR  
SUMMARY JUDGMENT

## I. INTRODUCTION

Plaintiff National Wildlife Federation (“NWF”) brought suit against the Federal Emergency Management Agency for violations of the Endangered Species Act in its implementation of the National Flood Insurance Program. Before the Court is NWF’s Motion for Summary Judgment (Dkt. # 74), and Defendant FEMA’s cross Motion for Summary Judgment (Dkt. # 84). Intervenor Defendant Property Owners for Sensible Floodplain Regulation opposed NWF’s motion (Dkt. # 90) and Intervenor Defendant Cities filed an opposition and cross motion (Dkt. # 92). Oral argument was held on March 14, 2014 and again on May 12, 2014. For the reasons set forth below, NWF’s motion will be denied and FEMA’s motion will be granted. To the extent the Defendant Cities motion joins FEMA’s cross motion for summary judgment, it will be granted on the grounds stated below.

## II. STATUTORY FRAMEWORK

This case involves the interaction of two congressional mandates: the National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001-4129, and the Endangered Species Act (“ESA”) of 1973, 16 U.S.C. §§ 1531-1544.

### A. The National Flood Insurance Act

Prior to 1968, there was a growing concern that the private insurance industry was unable to offer reasonably priced flood insurance on a national basis. *See* 42 U.S.C. § 4001(a), (b); *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 388 (9th Cir. 2000). Congress passed the National Flood Insurance Act (“NFIA”) of 1968 to address this concern. The purposes of the NFIA were to provide affordable flood insurance throughout the nation, encourage appropriate land use that would minimize the exposure of property to flood damage and loss, and thereby reduce federal

1 expenditures for flood losses and disaster assistance. 42 U.S.C. § 4001(d)-(f); *Florida Key Deer*  
 2 *v. Paulison*, 522 F.3d 1133, 1136 (11th Cir. 2008); *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d  
 3 386, 388 (9th Cir. 2000). To that end, the NFIA authorized the Federal Emergency  
 4 Management Agency (“FEMA”) to establish and carry out the National Flood Insurance  
 5 Program (“NFIP”). 42 U.S.C. § 4011.

6 There are three basic components of the NFIP: (1) the identification and mapping of  
 7 flood-prone communities, (2) the requirement that communities adopt and enforce floodplain  
 8 management regulations that meet minimum eligibility criteria in order to qualify for flood  
 9 insurance, and (3) the provision of flood insurance. *Nat’l Wildlife Federation v. Federal*  
 10 *Emergency Management Agency*, 345 F. Supp. 2d 1151, 1155 (2004). FEMA also implements a  
 11 Community Rating System (“CRS”), which provides discounts on flood insurance premiums in  
 12 those communities that establish floodplain management programs that exceed NFIP’s minimum  
 13 eligibility criteria. *Id.* The NFIA encourages community participation in the NFIP by  
 14 prohibiting federally-regulated banks or lenders, or federal agencies, from providing loans or  
 15 other financial assistance for acquisition or development within flood hazard areas of non  
 16 participating communities and by requiring that flood insurance be purchased as a precondition  
 17 for such financial assistance. Declaration of Jan Hasselman, Ex. 1 (the “BiOP”), p. 2.

#### 18 1. Mapping

19 FEMA is tasked with identifying and publishing information regarding “all flood plain  
 20 areas, including coastal areas located in the United States, which have special flood hazards.” 42  
 21 U.S.C. § 4101. A Special Flood Hazard Area or “SFHA” is “the land within the flood plain  
 22 within a community subject to a 1 percent or greater chance of flooding in a given year.” 44  
 23 C.F.R. § 59.1. FEMA puts data regarding the locations of SFHA and regulatory floodways on

1 Flood Insurance Rate Maps (“FIRMs”). The FIRMS, in turn, provide the basis both for the  
2 requirement that a developer obtain flood insurance as well as the calculation of the actual flood  
3 insurance rate for any new construction.

4 FEMA is required to assess the need for revisions and updates of FIRMs “based on an  
5 analysis of all natural hazards affecting flood risks.” 42 U.S.C. § 4101(e)-(f). However, state  
6 and local governments may request map revisions by submitting sufficient technical data to  
7 justify the request. *See* 42 U.S.C. § 4101(f)(2). In addition, FEMA has promulgated regulations  
8 that allow individual landowners to request map changes, called Letters of Map Change  
9 (“LOMC”), de-designating property as within the SFHA. *See* 44 C.F.R. §§ 65.4-65.8, 44 C.F.R.  
10 Part 72; 42 U.S.C. § 4104. The letters are issued when a physical structure or the placement of  
11 earthen fill has raised the property outside the SFHA so that it is no longer subject to the 1%  
12 annual chance of flooding. 44 C.F.R. § 72.2. A LOMC may also be issued when there is an  
13 official determination by FEMA that a property has been inadvertently included in the SFHA or  
14 regulatory floodway. 44 C.F.R. Part 70. Finally, a community or individual may request  
15 FEMA’s comments as to whether a proposed project, if built as proposed, would result in a flood  
16 map revision. FEMA’s comments in response to such a request are issued in the form of a  
17 Conditional Letter of Map Change (CLOMC”). 44 C.F.R. § 65.8, Part 70, Part 72.

18 2. Minimum Eligibility Requirements

19 To qualify for the program, communities must adopt land use controls at least as  
20 restrictive as the minimum criteria established by FEMA. *See* 42 U.S.C. § 4102(c). FEMA  
21 promulgated regulations setting forth the minimum floodplain management criteria required by  
22 the NFIA in 1976. 42 U.S.C. § 4129; 41 Fed. Reg. 46,975 (Oct. 26, 1976). Under these  
23 regulations, in order to qualify for insurance under the NFIP, a participating community must

adopt and enforce a floodplain management ordinance that meets or exceeds regulatory criteria. 44 C.F.R. §§59.2(b), 59.22(a)(3), 60.1. The criteria apply to all areas within a community that are mapped as within the SFHA. A community that fails to adequately enforce its flood plain management ordinance may be put on probation or suspended from the NFIP. 44 C.F.R. §59.24(b)-(c).

### 3. Provision of Flood Insurance

FEMA must provide flood insurance to communities which have “evidenced a positive interest in securing flood insurance coverage under the flood insurance program” and have “given satisfactory assurance that ... adequate land use and control measures will have been adopted ... which are consistent with the comprehensive criteria for land management and use developed” under 42 U.S.C. § 4102. 42 U.S.C. § 4012(c).

### 4. Community Rating System

FEMA is authorized “to carry out a community rating system program, under which communities participate voluntarily ... to encourage adoption of more effective measures that protect natural and beneficial floodplain functions,” among other goals. 42 U.S.C. § 4022(b)(1). FEMA’s CRS provides discounts on flood insurance premiums in communities that establish floodplain management programs that go beyond the NFIP’s minimum eligibility criteria.

## **B. The Endangered Species Act**

Section 7(a)(2) of the ESA requires federal agencies to “ensure” that their actions do not cause “jeopardy” to endangered or threatened species. 16 U.S.C. § 1536(a)(2). To cause jeopardy is to “reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild.” 50 C.F.R. § 402.02. The federal agency undertaking such an activity must consult the service having jurisdiction over the relevant endangered species. The U.S. Fish and

1 Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), are jointly  
2 responsible for administering the ESA and the scope of their respective jurisdictions is set forth  
3 in 50 C.F.R. § 402.01(b) (1987). Here, the service involved is the NMFS.

4 Under the Act, following consultation, the service must issue a biological opinion that  
5 details how the proposed action “affects the species or its critical habitat,” including the impact  
6 of “incidental takings” of the species. An incidental taking “refers to takings that result from, but  
7 are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency  
8 or applicant.” 50 C.F.R. § 402.02. If a species might be endangered by the agency action, the  
9 service suggests a “reasonable and prudent alternative” (“RPA”) to the agency’s proposal. 16  
10 U.S.C. at § 1536(b)(3)(A). “The agency is not required to adopt the alternatives suggested in the  
11 biological opinion; however, if the Secretary deviates from them, he does so subject to the risk  
12 that he has not satisfied the standard of section 7(a)(2).” *Tribal Village of Akutan v. Hodel*, 869  
13 F.2d 1185, 1193 (9th Cir. 1988) (citing *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1160-  
14 61 (D. Alaska 1983), *aff’d*, 733 F.2d 605 (9th Cir. 1984)). Thus, “section 7(a)(2) imposes two  
15 obligations upon federal agencies. The first is procedural and requires that agencies consult with  
16 the NMFS or FWS to determine the effects of their actions on endangered or threatened species  
17 and their critical habitat. The second is substantive and requires that agencies insure that their  
18 actions not jeopardize endangered or threatened species or their critical habitat.” *Florida Key*  
19 *Deer v. Paulison*, 522 F.3d 1133, 1138 (11th Cir. 2008) (citing 16 U.S.C. § 1536(b) & (a)(2)).

### 20 III. PROCEDURAL HISTORY

#### 21 A. The 2003 Litigation

22 In 2003, Plaintiff National Wildlife Federation (“NWF”) brought suit against FEMA,  
23 alleging that FEMA was in violation of the Endangered Species Act for failing to comply with its

1 procedural obligation under 16 U.S.C. § 1536(a)(2) to consult with the NMFS on impacts of the  
2 NFIP to the Puget Sound Chinook salmon, a threatened species. *See NWF v. FEMA*, 345 F.  
3 Supp. 2d at 1151. Section 7 requires every federal agency to engage in consultation to “insure  
4 that any action authorized, funded or carried out by such agency ... is not likely to jeopardize the  
5 continued existence of any endangered species or threatened species or result in the destruction  
6 or adverse modification of habitat of such species.” 16 U.S.C.A. § 1536(a)(2).

7 Although FEMA did not have discretion to deny insurance to a person in an otherwise  
8 eligible community, the Court concluded that FEMA did have discretion in its mapping  
9 activities, discretion to amend its regulations establishing the minimum eligibility criteria to  
10 qualify for flood insurance, and discretion to promote conservation measures through the CRS.  
11 *NWF v. FEMA*, 345 F. Supp. 2d at 1168-1174. In addition, the Court found substantial evidence  
12 that FEMA’s implementation of NFIP in the Puget Sound region “may affect” Chinook salmon.  
13 As a result, FEMA was held in violation of the ESA and was ordered to initiate consultation with  
14 NMFS within sixty days.

15 Pursuant to the Court’s order, FEMA initiated consultation with NMFS in 2004. After  
16 four years of scientific review and inter-agency negotiations, on September 22, 2008, NMFS  
17 issued a 226-page biological opinion on the impacts of the NFIP on ESA-listed species in the  
18 Puget Sound region. *See BiOp*. The BiOp concluded that implementation of the NFIP  
19 jeopardized the survival of not only Puget Sound Chinook salmon, but also Puget Sound  
20 steelhead, Hood Canal chum salmon, and Southern Resident killer whales. BiOp at 150. The  
21 BiOp also concluded that continued implementation of the NFIP would destroy or adversely  
22 modify critical habitat for Puget Sound Chinook salmon, Hood canal chum salmon, and Southern  
23 Resident killer whales. *Id.*

**B. The 2008 Biological Opinion**

Pursuant to its obligations under the ESA, NMFS presented FEMA with a Reasonable and Prudent Alternative to the NFIP to ensure that the action did not cause jeopardy to the listed species or adversely modify their critical habitat. The RPA consists of seven elements, summarized as follows:

1. **Notification.** FEMA was instructed to notify all 122 NFIP communities in the Puget Sound region within 30 days that “development consistent with the NFIP jeopardizes the listed species and adversely modifies their critical habitat.” BiOp at 151. The notification was to suggest measures for avoiding and minimizing take.
2. **Mapping.** This element directed FEMA to make multiple changes to its mapping program. Most significantly, FEMA was instructed to process LOMC only when the proponent demonstrated “that the alteration avoids habitat functional changes, or that the proponent has mitigated” for such changes. BiOp at 152-53. FEMA was also directed to address effects that could occur later in time; to prioritize mapping activities based on the presence of salmon; and to increase the accuracy of maps through use of on-the-ground data and consideration of “future conditions,” including climate change. *Id.*
3. **Floodplain Management Criteria.** This element directed FEMA to revise its floodplain management criteria. BiOp at 154.
4. **Community Rating System.** This element directed FEMA to change the CRS to increase points for salmon-friendly measures and decrease points for measures that reduce flood risk but harm habitat, such as through the use of levees. *Id.* at 158-59.



1       **5. Levee Vegetation and Construction.** This element called for four specific changes,  
2       to be implemented within one year. *Id.* at 160-62. (1) FEMA was prohibited from  
3       recognizing levees that are certified by the Army Corps of Engineers unless it is  
4       demonstrated that the standard will not adversely affect species or habitat. (2) FEMA  
5       was directed to revise its procedures so that levee owners that opt out of the Corps'  
6       funding program and maintain vegetation remain eligible for emergency funding. (3)  
7       FEMA was directed to use, and encourage grantees to use, Hazard Mitigation grant  
8       funding and the Flood Mitigation Assistance Program for projects that reduce flood  
9       risk and also benefit salmon. (4) FEMA was instructed to recognize new levees and  
10      floodwalls only if they include certain habitat-protecting features.

11      **6. Mitigation.** For development in floodplains that degrade habitat during the period  
12      prior to full implementation of the RPA, FEMA was instructed to “ensure” that  
13      appropriate mitigation occurs. *Id.* at 162.

14      **7. Monitoring and Adaptive Management.** FEMA was directed to undertake regular  
15      monitoring and reporting of progress towards each of the other RPA elements. *Id.*

16      In addition to the seven-element RPA outlined above, the BiOp also includes an  
17      Incidental Take Statement, which insulated FEMA and participating communities from liability  
18      under Section 9 of the ESA if they complied with the RPA. *Id.* at 168-175.

### 19      **C. The 2011 Litigation**

20      Before the Court is NWF’s second suit against FEMA concerning FEMA’s  
21      implementation of the BiOp. There is no dispute that FEMA has complied with its procedural  
22      obligations under the ESA and the Court’s 2004 order to consult with the NMFS. However,  
23      more than three years after the NMFS issued the BiOp, the parties dispute whether FEMA has  
24

1 properly implemented the 7-element RPA contained in the BiOp such that it is no longer  
2 jeopardizing the continued existence of ESA-listed species causing the destruction of their  
3 critical habitat.

4       The court has already considered, and denied, NWF's previous motion for a preliminary  
5 injunction on the ground that NWF failed to demonstrate a likelihood of irreparable injury. Dkt.  
6 # 69. NWF now moves the Court to issue a declaratory judgment that FEMA's implementation  
7 of NFIP violates § 7(a)(2) of the ESA. NWF seeks summary judgment on a single claim for  
8 relief: a § 7(a)(2) violation of the ESA, 16 U.S.C. § 1536(a)(2).<sup>1</sup> It contends that FEMA's current  
9 implementation of the NFIP in the Puget Sound Region fails to "ensure against jeopardy" to  
10 protected salmon and orcas. Specifically, NWF challenges FEMA's implementation of RPA  
11 Elements 2, 3, 5, 6, and 7.<sup>2</sup> FEMA has cross moved for summary judgment seeking a  
12 determination by the Court that it has complied with its substantive obligations under the RPA.  
13 The cities of Arlington, Auburn, Burlington, Everett, Federal Way, Kent, Lake Forest Park,  
14 Mount Vernon, North Bend, Orting, Puyallup, Renton, Snoqualmie, Sultan, and Tukwila  
15 (collectively the "Cities"), as well as the non-profit organization Owners for Sensible Floodplain  
16 Regulation ("POSFR"), oppose Plaintiff's motion as intervenor defendants. Both FEMA and the  
17 intervenor Cities have cross-moved for summary judgment and seek dismissal of the Complaint  
18 in its entirety.

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21  
22 <sup>1</sup> NWF also seeks voluntary dismissal without prejudice of its second and third claims for relief  
pursuant to Fed. R. Civ. P. 41(a)(2). Dkt. # 74, p. 7 n.2.

23 <sup>2</sup> During the briefing period, FEMA informed NWF that it had satisfied its obligation under RPA  
Element 4. FEMA has since acknowledged NWF's compliance.

#### IV. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party meets its initial burden, however, the opposing party must then set forth specific facts showing that there is some genuine issue for trial in order to defeat the motion. *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986). Courts have found that since the ESA does not contain an express standard of review, the appropriate standard of review is whether the agency's actions are arbitrary and capricious, an abuse of discretion, or contrary to law. *See Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1989).

#### V. REVIEW UNDER THE APA

The Supreme Court has declared the ESA to be “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *TVA v. Hill*, 437 U.S. 153, 180 (1978) (“Congress intended endangered species to be afforded the highest of priorities.”). “The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184. To accomplish this, the ESA includes substantive and procedural requirements that take “priority over the ‘primary missions’ of federal agencies.” *Id.*

As discussed above, section 7 of the ESA establishes a consultation procedure to assist agencies in meeting this requirement whereby the expert wildlife agency issues a biological opinion on whether the agency action will cause jeopardy. 50 C.F.R. §§ 402.14(a), (b), and (g). If the wildlife agency determines that jeopardy will occur, it must provide a “reasonable and

1 prudent alternative” (“RPA”) to the proposed action that will avoid jeopardy. *Id.* §§ 402.14(g),  
2 (h). The RPA must be consistent with the intended purpose of the proposed action and be within  
3 the action agency’s authority. *Id.* § 402.03. If the agency cannot identify an RPA or if the action  
4 agency is unwilling to implement it, the proposed action is prohibited without cabinet-level  
5 authorization. 16 U.S.C. § 1536(e).

6 The RPA outlines one path that will avoid jeopardy and an agency may depart from the terms  
7 of the RPA if it takes “alternative, reasonably adequate steps to insure the continued existence of any  
8 endangered or threatened species.” *Tribal Village of Akutan*, 869 F.2d at 1193; *Village of False Pass*  
9 *v Watt*, 565 F. Supp. 2d 1123, 1154 (D. Alaska 1983) (“the decision whether or not to proceed with  
10 the project rests ultimately with the Secretary. He must insure that agency actions are not likely to  
11 jeopardize the continued existence of the species”). When an agency decides to depart from the terms  
12 of the RPA, its decision must not be “arbitrary, capricious, an abuse of discretion, or otherwise not in  
13 accordance with the law.” *Tribal Village of Akutan*, 869 F.2d at 1193. Further, “[t]he biological  
14 opinion is accorded substantial weight as evidence of the Secretary’s compliance with the [ESA.]”  
15 *Bennett v. Spear*, 520 U.S. 154, 169-70 (1997) (“A federal agency that chooses to deviate from the  
16 recommendations contained in a biological opinion bears the burden of ‘articulating in its  
17 administrative record its reasons for disagreeing with the conclusions of a biological opinion’” (citing  
18 51 Fed. Reg. 19,926, 19,956 (June 3, 1986)). Importantly, any decision to depart from an RPA must  
19 be “well reasoned and supported by the record.” *Tribal Village of Akutan*, 869 F.2d at 1194. The  
20 agency need not, however, “justify [its] decisions by clear and convincing evidence.” *Id.* at 1193.

21 In *Tribal Village of Akutan*, a case cited favorably by all parties, several Alaskan villages and  
22 environmental organizations brought suit against the Secretary of the Interior to enjoin a multi-stage  
23 oil and gas lease sale for the North Aleutian Basin. The plaintiffs argued, *inter alia*, that the Secretary  
24 violated ESA section 7 when he deviated from the RPAs set forth in NMFS’s biological opinion. In

1 the biological opinion, NMFS determined that a major oil spill during a peak migration period for  
2 gray whales would be likely to jeopardize the continued existence of the species. NMFS's RPA  
3 suggested creating a large offshore buffer zone to reduce the impact of an oil spill on gray whales.  
4 The Secretary did not fully adopt the proposal and instead opted to create a smaller offshore buffer  
5 zone as well as take additional mitigating actions.

6 The Ninth Circuit Court of Appeals held that the Secretary's decision to reject some of  
7 NMFS's RPA requirements was neither arbitrary nor capricious. The Court explained that the  
8 Secretary offered a well reasoned explanation for his decision to not provide the full offshore buffer  
9 zone suggested by the biological opinion. The Secretary supported his position by stating that  
10 "exploration-stage spills are most unlikely, that deletion of nearshore tracts would only marginally  
11 reduce the threat to endangered whales from such spills, and that seasonal or ad hoc drilling  
12 restrictions [could] provide adequate protection." *Id.* at 1194. The Court noted that the Secretary also  
13 adopted other mitigating measures, which included an agreement to consult informally with NMFS  
14 both during and after the lease-sale process, a modification of the Final Notice of Sale that informed  
15 lessees that drilling activities could be suspended during whale migration periods, and a requirement  
16 that operators and lessees post whale lookouts when conducting seismic tests. Further, the Court  
17 cited the district court's observation that the alternative action and mitigating measures adopted by  
18 the Secretary appeared to satisfy NMFS's parent agency, NOAA, "for in its final ESA comments on  
19 the sale NOAA did not reiterate those recommendations." *Id.* at 1194. In discussing that the  
20 Secretary had (1) implemented additional mitigation efforts, (2) demonstrated the improbability of a  
21 lease-sale stage oil spill, and (3) left an opening for further action down the road, the Court  
22 concluded that the Secretary had "fulfilled his responsibility to 'insure that agency action [was] not  
23 likely to jeopardize the continued existence of any endangered species.'" *Id.* at 1195 (quoting 16  
24 U.S.C. § 1536(a)(2)).

1 NWF has the ultimate burden to show that FEMA's implementation of the RPA is  
2 "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5  
3 U.S.C. § 706(2)(A). Under this standard, if FEMA has "considered the relevant factors and  
4 articulated a rational connection between the facts found and the choices made[.]" then the Court  
5 must uphold the agency's action. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206 (9th Cir.  
6 2004) (citation omitted). The Court is required to "make a careful and searching inquiry into the  
7 facts" but it may not "substitute its judgment for that of the agency." *Center for Marine*  
8 *Conservation v. Brown*, 917 F. Supp. 1128, 1143 (S.D. Texas 1996). An agency only violates the  
9 APA if it has "relied on factors which Congress has not intended it to consider, entirely failed to  
10 consider an important aspect of the problem, offered an explanation for its decision that runs  
11 counter to the evidence before the agency, or is so implausible that it could not be ascribed to a  
12 difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm*  
13 *Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

## 14 VI. MOTION TO STRIKE

15 FEMA renews its motion to strike the Wald and Kirkpatrick declarations. It contends that  
16 (1) the declarations are improper extra-record evidence under the APA, 5 U.S.C. § 706; (2) Ms.  
17 Kirkpatrick's declarations are expert witness material submitted in violation of 18 U.S.C. § 207;  
18 and (3) Plaintiff did not qualify Mr. Wald as an expert under Fed. R. Evid. 702.

19 The Court denied NWF's motion for preliminary injunction on April 12, 2012 (Dkt. #  
20 69). Within the Order, and at issue here, the Court stated that it would permit review of extra-  
21 record evidence because "the evidentiary restrictions under the APA do not apply and the Court  
22 may consider evidence outside the administrative record," citing *Western Watersheds Project v.*  
23 *Kraayenbrink*, 632 F.3d 472, 487 (9th Cir. 2010) for support. Dkt. # 69, p. 13.

1       The *Kraayenbrink* court expressly stated that “under *Washington Toxics Coalition* we  
2 may consider evidence outside the administrative record for the limited purposes of reviewing  
3 Plaintiff’s ESA claim.” *Kraayenbrink*, 632 F.3d at 497. In addition, in *Oregon Natural Desert*  
4 *Ass’n v. Kimbell*, 593 F. Supp. 2d 1217 (D. Or. 2009), the district court upheld the Magistrate  
5 Judge’s decision to permit extra-record review and fleshed out its reasoning by discussing the  
6 burden of proof necessary for plaintiff to prevail on its ESA claims. For example, the court noted  
7 that under the plaintiff’s ESA § 9 “taking” claim, plaintiff was required to prove by a  
8 preponderance of the evidence that the Forest Service’s actions resulted in an unlawful take of a  
9 protected species, and that the take was reasonably certain to occur under the Forest Service’s  
10 contested program. *Id.* at 1220. The court noted further that the ESA claim could be  
11 distinguished from a claim that challenges a specific administrative decision. *See id.* at 1220-21  
12 (“Claims challenging the propriety of a consulting agency issuing a biological opinion are  
13 governed by the APA. Claims arising directly under the ESA Citizen Suit Provision . . . , on the  
14 other hand, based upon events occurring in the aftermath of agency decisions, are not limited by  
15 the APA scope of review.”) (citations omitted). Because this case concerns FEMA’s revised and  
16 ongoing implementation of the NFIP in the wake of the 2008 BiOp, extra-record evidence may  
17 be admissible. Thus, the Wald and Kirkpatrick declarations will not be stricken on that basis.

18       However, the Court finds that the Wald and Kirkpatrick declarations are simply not  
19 relevant. Federal Rule of Evidence 702 provides:

20       If scientific, technical, or other specialized knowledge will assist the trier  
21 of fact to understand the evidence or to determine a fact in issue, a witness  
22 qualified as an expert by knowledge, skill, experience, training, or  
23 education, may testify thereto if (1) the testimony is based upon sufficient  
24 facts or data, (2) the testimony is the product of reliable principles and  
methods, and (3) the witness has applied the principles and methods  
reliably to the facts of the case.

1 The trial court must act as a “gatekeeper” to ensure that proffered expert testimony is  
2 both relevant and reliable. *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct.  
3 1167, 143 L.Ed.2d 238 (1999). Relevance means that the evidence will assist the trier of fact to  
4 understand or determine a fact in issue. *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007); *see*  
5 Fed. R. Evid. 702. Where expert testimony is based on “technical” or “other specialized  
6 knowledge” rather than science, the Court must ensure that it “rests on a reliable foundation and  
7 is relevant to the task at hand.” *United States v. Hermanek*, 289 F.3d 1076, 1093 (9th Cir. 2002)  
8 (quoting *Daubert*, 509 U.S. at 597). The gatekeeping function serves to “make certain that an  
9 expert, whether basing testimony upon professional studies or personal experience, employs in  
10 the courtroom the same level of intellectual rigor that characterizes the practice of an expert in  
11 the relevant field.” *Kumho*, 526 U.S. at 152.

12 Ms. Kirkpatrick’s declarations contain her opinions about whether FEMA’s  
13 implementation of the NFIP complied with the RPA during her tenure at the NMFS, which  
14 ended prior to the start of this litigation. As explained below, the Court must measure FEMA’s  
15 compliance with the RPA against the language contained in the RPA. Ms. Kirkpatrick’s  
16 declarations do not inform this process because the record speaks for itself. NMFS is not a party  
17 to this suit, and Ms. Kirkpatrick’s opinions are not formal statements concerning NMFS’s  
18 approval or disapproval of FEMA’s implementation of the NFIP.

19 Mr. Wald’s declarations are primarily directed to assessing individual community  
20 compliance with the developments standards contained within the RPA. Thus, Mr. Wald’s  
21 declarations do not assist the Court in measuring FEMA’s administration of the NFIP against the  
22 plain terms of the RPA. Accordingly, the Court will grant the motion to strike.  
23



## VII. ANALYSIS

### A. The Contested RPA Elements (2, 3, 5, 6, and 7)

The parties devoted the majority of their briefing and argument to the substantive requirements of RPA Element 3. Thus, the Court begins its analysis there.

#### 1. RPA Element 3: NFIP Minimum Criteria

Element 3 directed FEMA to “modify its implementation of the NFIP minimum criteria in NFIP communities in the Puget Sound Region in order to prevent and/or minimize the degradation of channel and floodplain habitat.” BiOp at 153. The BiOp identified two types of areas within the SFHA floodplain: the Protected Area, and the remainder of the floodplain. Different development standards apply to each area. The Protected Area consists of the outermost boundary within the SFHA of either (1) the floodway, (2) the Channel Migration Zone (“CMZ”) plus 50 feet, or the Riparian Buffer Zone (“RBZ”) as described by Washington State regulations. BiOp 2d Errata (Dkt. # 11-1, p. 245). RPA 3.A created the development standard for each area. NWF takes issue with the how FEMA has revised its NFIP eligibility process to comply with RPA 3.A. NWF contends that FEMA’s “3 Door” compliance pathway does not avoid jeopardy because no door option incorporates all of the RPA’s standards and directives. NWF considers Door 3 compliance option the most problematic.

RPA Element 3.A directs FEMA to revise its implementation of its minimum criteria compliance standards such that community eligibility requires either (1) no development within the Protected Area, **or** (2) that local permitting authorities demonstrate “no adverse effects” of proposed development within the Protected Area. This means that NFIP communities must “demonstrate to FEMA that any proposed development in the [Protected Area] does not adversely affect water quality, water quantity, flood volumes, flood velocities, spawning

1 substrate, and/or floodplain refugia for listed salmonids.” BiOp at 154. In addition, there must be  
2 either (1) no development in the 100 year floodplain, **or** (2) for permitted development within the  
3 floodplain, the adoption of certain mitigation measures and use of Low Impact Development  
4 methods. *See id.*

5 *a. Overview of FEMA’s 3 Door Compliance Pathway*

6 FEMA argues that it does not have land use authority and cannot prohibit floodplain  
7 development. Thus, it cannot implement the BiOp’s “no development” directives. To comply  
8 with the BiOp’s alternative directives, it has created the 3 Door compliance pathway that allows  
9 NFIP communities to demonstrate compliance with Element 3.A. This compliance program was  
10 created in collaboration with a focus group that included NMFS staff and the NFIP communities.  
11 Dkt. # 86, Carey SJ Decl., ¶ 76.

12 Door 1 requires a community to adopt FEMA’s Model Ordinance, which FEMA  
13 contends incorporates all of the performance standards required by Element 3.A and Appendix 4  
14 of the BiOp. *See* Dkt. # 17, Carey PI Decl., ¶ 67. If a community chooses this option, it must  
15 enact the Model Ordinance through its own lawmaking process.

16 Because some communities reported that they already had state-mandated ordinances and  
17 programs that complied with Element 3.A, FEMA developed a Compliance Checklist for these  
18 communities to show FEMA the location of each of the performance standards within their local  
19 regulations. *Id.* at ¶ 74. This is referred to as Door 2 compliance.

20 Door 3 compliance allows a community to demonstrate compliance with Element 3.A on  
21 a permit-by-permit basis. *Id.* at ¶ 69. This pathway requires development permit applicants to  
22 submit a habitat assessment to their local permitting authority. *Id.* at ¶¶ 80-81. Unless the  
23 applicant demonstrates “no adverse effects” of the project, the applicant must either abandon or

1 redesign the project, or undergo an ESA consultation with NMFS before a permit may be  
2 granted. *Id.*

3 For Door 1 and 2 communities, FEMA has requested that NMFS review the  
4 communities' compliance submissions to ensure that they satisfy Element 3.A's directives. Dkt.  
5 # 86, Carey SJ Decl., ¶ 156.

6 *b. FEMA's implementation of RPA Element 3*

7 RPA Element 3.B states in relevant part that "the FEMA shall implement Element 3.A by  
8 ensuring that all participating NFIP communities in the Puget Sound Region implement land-use  
9 management measures consistent with the criteria . . . ." BiOp at 155. The "Minimum Criteria"  
10 are found in Appendix 4 in the BiOp. *Id.* at 221-26. Plaintiff contends that each of FEMA's 3  
11 Doors for community compliance fail to incorporate Appendix 4's development standards and  
12 directives. Primarily concerned with the permit-by-permit approach to Door 3 compliance,  
13 Plaintiff argues that FEMA's lack of oversight over individual development permits allows NFIP  
14 communities to avoid the proscriptive measures of the RPA. FEMA contends that its 3 Door  
15 compliance pathway satisfies Element 3 because (1) the BiOp does not require it to police the  
16 permit counter of each NFIP community, (2) even if there are problems with the individual  
17 communities' compliance, FEMA's implementation of the compliance pathways, the guidance it  
18 offers, and the monitoring of community compliance it conducts satisfies the RPA, and (3)  
19 NMFS has formally stated that FEMA's current approach is consistent with the intent of RPA  
20 Element 3. The Court agrees with FEMA that the measures it has taken are consistent with the  
21 language of the BiOp.

22 To demonstrate that FEMA's implementation of the NFIP fails to satisfy Element 3,  
23 Plaintiff focuses on actions taken by the communities in approving floodplain development

1 permits. Plaintiff points to numerous instances where it believes that individual communities  
2 have failed to implement the Minimum Criteria. *See, e.g.*, Dkt. # 75, Auburn City Code,  
3 15.68.160(B) (Hasselman SJ Decl., Ex. 23); *id.*, Roy City Code, 31-1-5(1)(C) (Hasselman SJ  
4 Decl., Ex. 22). But as FEMA notes, it is not a land-use authority and it can only provide  
5 guidance, technical assistance, require reporting, and institute enforcement actions, which is  
6 what is required of it under the RPA. FEMA believes that it has done, and continues to do, what  
7 it can with the authority it has.

8       The BiOp states that it is the local jurisdiction with permitting authority that must  
9 demonstrate to FEMA that any proposed development will not adversely affect protected habitat.  
10 *See* BiOp at 154. Further, the BiOp contemplated that RPA compliance would require protracted  
11 interactions between FEMA, the NFIP communities, and NMFS. For example, Element 3.D  
12 recognized that jurisdictions may grant development permits that allowed development without  
13 considering the Minimum Criteria or appropriate mitigation. *See* BiOp at 157. In such instances,  
14 the BiOp required FEMA to flag and report the information to NMFS. *Id.* Then, “[i]f NMFS  
15 finds that any unmitigated actions affecting listed species have occurred as a result of these  
16 permits, FEMA will ensure mitigation for these actions . . . .” *Id.* Throughout the RPA, the BiOp  
17 mandates ongoing communication between the NFIP jurisdictions, FEMA, and NMFS to ensure  
18 that *the communities* adopt floodplain management measures that are consistent with the  
19 Minimum Criteria. *See, e.g., id.* at 157 (“The FEMA must report to NMFS on their [sic] progress  
20 . . . [a]lso, communities will provide information to FEMA on a semi-annual basis”).

21       Importantly, the RPA does not identify a specific compliance program for FEMA to  
22 implement. It is silent on how FEMA should ensure that communities meet the “no adverse  
23 effects” standard for all development going forward. Further, although the BiOp recognizes that

1 there are vastly different floodplain development considerations among the 122 Puget Sound  
2 communities, it fails to provide any tailored recommendations or compliance approaches for  
3 those individual communities. Indeed, NMFS recognized this to be true. *See* AR 16435, Stelle  
4 Sept. 26, 2011 Letter (“The RPA was written as a programmatic consultation that applies to the  
5 entire geographic region, and the applicability of each element of the RPA may vary from place  
6 to place since differing jurisdictions have differing floodplain conditions and requirements . . .  
7 some components of the RPA may not apply to every jurisdiction, because in some jurisdictions  
8 the floodplain no longer contains essential habitat features. NMFS believes it is contingent on  
9 local governments to determine which functions are present in the floodplain, and how they will  
10 maintain and restore floodplain functions.”). Consistent with the letter of the BiOp, NMFS also  
11 believed that communities are responsible for identifying how they can best comply with the  
12 general standards outlined in the RPA.

13       Ultimately, the BiOp lacks any specific Element 3 implementation guidance for FEMA.  
14 The Court agrees with Plaintiff “that without clear and objective standards for adverse effects,  
15 project proponents can easily prepare ‘assessments’ finding no adverse impact.” Dkt. # 74, p. 32.  
16 However, it was the BiOp, not FEMA, that created the undefined “no adverse effects”  
17 enforcement obligation. *See, e.g.*, BiOp at 154 (introducing adverse effects language without  
18 explaining or defining term). The record shows that FEMA and the communities sought  
19 extensive assistance from NMFS to clarify the BiOp’s ambiguous compliance standard. *See, e.g.*,  
20 Dkt. # 34-2, p. 2 (“[NMFS] recognize[s] there is a lack of clarity amongst local jurisdictions  
21 regarding expected implementation efforts”).

22       To date, FEMA has issued several guidance documents to help communities understand  
23 their compliance obligations under the RPA. These documents include the Door 1 “Model  
24

Ordinance” (AR 16524), the Door 2 “checklist” (AR 16610), the “Habitat Assessment Guidance” document (AR 2950), and the “FAQ” memoranda (AR 3220-3250). Contrary to Plaintiff’s argument that FEMA’s permit-by-permit approach requires only “an ‘assessment’ of unspecified content to meet an undefined standard,” FEMA’s guidance documents give meaning and depth to the undefined standard set out in the BiOp. For example, with respect to Door 3 compliance, FEMA issued the “What does it mean to be in ‘Door 3’” FAQ document. AR 3241-43. Therein, FEMA explained to Door 3 communities that

[i]n order to avoid allowing incremental, systemic loss of essential ecosystem features to occur, the compliance standard for Door 3 must be a high showing that individual projects seeking development in the floodplain will retain the full level of baseline function. The impact of the project on habitat may be difficult to evaluate because there is often little or no information on the baseline conditions of the site’s natural features and habitat functions. The scope, magnitude, and risks associated with possible impacts to populations or their habitats vary greatly by project. A habitat assessment is needed to identify those natural processes and habitat functions that currently exist (i.e. the environmental baseline) and determine how the proposed project will affect them.

AR 3241-42. The FAQ document directs communities to the FEMA Region X Guidance for conducting habitat assessments, and that guidance document provides detailed information for communities about how to demonstrate ESA compliance for proposed development projects.

Because the BiOp failed to identify meaningful and community-tailored compliance options, FEMA was tasked with creating a comprehensive compliance program. It then had to take into account the disparate resources, technical expertise, and baseline environmental conditions of the Puget Sound communities to craft a workable program.

Consistent with its enforcement obligation, FEMA has initiated enforcement actions against communities that were late in submitting annual reports and against communities that failed to demonstrate RPA compliance before issuing floodplain development permits. For the

1 48 communities that had not, as of February 2012, complied with FEMA's annual reporting  
2 requirement, FEMA required them to submit reports and conducted in-person visits. Dkt. # 86,  
3 Carey SJ Decl., ¶¶ 221-23. Further, FEMA initiated enforcement actions in four communities  
4 after it learned that development projects were allowed to proceed without the required adverse  
5 effects analysis. *Id.* at ¶¶ 224-242. For those projects, FEMA sought documentation, explanation,  
6 local building code enforcement action, or changes to local permitting procedures. *Id.* FEMA  
7 conducted on-site and in-person enforcement visits with NMFS personnel, and it maintains that  
8 the unauthorized projects are either undergoing ESA § 7 consultation, or that the problematic  
9 structures have been removed, or that local building code enforcement actions are pending. *See*  
10 *id.*

11 Plaintiff relies on *Florida Key Deer v. Brown*, 364 F. Supp. 2d 1345 (S.D. Fla. 2005)  
12 *aff'd sub nom. Florida Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008), to support its  
13 contention that FEMA's permit-by-permit approach is unlawful because it relies on the  
14 communities' voluntary participation, subject only to FEMA's enforcement and oversight, which  
15 does not protect against cumulative habitat loss. In *Florida Key Deer*, the court found that both  
16 FWS and FEMA abused their discretion by adopting and implementing an arbitrary and  
17 capricious RPA that failed to protect threatened species against jeopardy. The court considered  
18 the RPA deficient for two reasons. First, the Court determined that the RPA proscribed a  
19 voluntary approach that did "nothing to ensure that either the county or the landowners w[ould]  
20 comply with the RPA's procedures." *Id.* at 1356. Second, it determined that by allowing  
21 development to proceed on a project-by-project basis, the RPA unlawfully failed to consider the  
22 cumulative effects to habitat loss. *Id.* at 1357.

1 NWF raises the same challenges here, but *Florida Key Deer* can be distinguished on both  
2 points. As to voluntary participation, FEMA has not made community compliance voluntary.  
3 FEMA requires NFIP communities to choose a compliance pathway to remain NFIP eligible. It  
4 then offers those communities guidance on how they may satisfy their ESA compliance  
5 obligations under each of the compliance options. That not all of Appendix 4's directives and  
6 FEMA's guidance may be applicable to an individual community does not make FEMA's  
7 compliance program "optional." In *Florida Key Deer*, the RPA allowed for FWS to review  
8 development projects at its discretion, and it did not compel landowners to comply with FWS's  
9 recommendation, should FWS choose to review a project. Here, the record demonstrates that  
10 FEMA required each community to choose a compliance pathway, and that it initiated  
11 enforcement actions when communities failed to comply.

12 Plaintiff's cumulative effects challenge relies on the baseline assumption that project-by-  
13 project review can never account for cumulative adverse effects to critical habitat. Critically, the  
14 BiOp does not prohibit FEMA from allowing permit-by-permit review so long as a cumulative  
15 effects analysis takes place during the permitting review process. Although it makes sense that  
16 assessing the cumulative impact of development projects during the review process for an  
17 individual project will be more difficult, the BiOp does not prohibit such an approach and FEMA  
18 has recognized that permit-by-permit review is not without limitations. *See* AR 3239. Moreover,  
19 the record here contains no quantifiable evidence of cumulative adverse effects to critical habitat.

20 The record before the *Florida Key Deer* court was different. There, the RPA allowed for  
21 permit-by-permit review of proposed development projects. The record showed that of the 2,022  
22 projects allowed to go forward, 101 of the projects were for fences in critical habitat areas where  
23 the threatened Key Deer's survival was at risk "*due to fencing[.]*" *Florida Key Deer*, 364 F.



1 Supp. 2d at 1357. On that record, the court easily concluded that FWS’s “piecemeal review is  
 2 inconsistent with conclusions of FWS that habitat loss and fragmentation ‘taken together’ cause  
 3 jeopardy to the Listed Species.” *Id.*

4 Finally, FEMA contends that the Court should consider NMFS’s formal statement that  
 5 NMFS believes FEMA has complied “with the intent of Element 3” as record evidence  
 6 demonstrating FEMA’s substantive compliance. This statement is found in NMFS Regional  
 7 Administrator William Stelle, Jr.’s letter to FEMA, dated February 3, 2012. The letter is  
 8 produced in relevant part as follows:

9 NMFS believes that the measures FEMA has implemented are consistent  
 10 with the intent of Elements 3 and 5. Your annual report for 2011 provides  
 11 new information for NMFS regarding FEMA’s compliance with other  
 12 elements of the RPA. NMFS will provide a review of the report in a  
 13 separate transmittal, but we are encouraged by the additional information  
 14 provided this year and the work that is reported as completed.

15 . . .

16 Element 3 requires significant changes to a complex program involving  
 17 numerous local jurisdictions, state and local regulations and coordination  
 18 between regional and national components of a Federal agency. There has  
 19 also been uncertainty about how to implement the RPA in highly  
 20 developed watersheds. Landscapes in Western Washington range from  
 21 undeveloped, nearly pristine habitats that maintain ecosystem functions to  
 22 fully developed landscapes with fair to poor quality habitat that will not  
 23 benefit from revised NFIP management under the RPA. *For judging the  
 24 sufficiency of the protective measures applied to these differing habitats it  
 is necessary to recognize the habitat functions that still exist. We  
 recognize there is a lack of clarity amongst the local jurisdictions  
 regarding expected implementation efforts needed for these different  
 habitats, and that the lack of clarity created difficulties for FEMA and  
 those local jurisdictions.* While NMFS does not expect heavily developed  
 floodplains to be restored to provide the natural ecosystem functions that  
 occur in undeveloped areas, it is our expectation that existing habitat  
 functions will be maintained and enhanced over time as part of the proper  
 and full execution of the RPA. Clarifying the differences among local  
 jurisdictions based upon existing habitat functions underscores the  
 importance of – and our appreciation for – maintaining the close  
 relationship with FEMA as the NFIP is implemented over time in a  
 manner that is consistent with the recovery of listed salmonids.

1  
2 Dkt. # 34-2, p. 2 (emphasis added). The cautious language used by NMFS, indicating that  
3 FEMA's compliance program satisfies the intent of Element 3, is not dispositive of whether  
4 FEMA has in fact complied with Element 3. The letter is not a formal determination by NMFS  
5 that the agency action complied with the RPA in full. The letter, however, is meaningful in a  
6 different way, as it lends support to the Court's construction of the scope of the RPA. The letter  
7 demonstrates that NMFS was aware that the RPA did not account for different baseline  
8 environmental conditions across the NFIP communities, and that the RPA failed to provide clear  
9 guidance for communities to implement relevant standards and directives. At heart, Plaintiff  
10 relies on evidence of an individual community's confusion over what RPA standards it must  
11 consider before issuing a development permit, or an individual community's failure to provide  
12 the required habitat assessment, to prove that FEMA has failed to implement Element 3. That  
13 factual evidence, which is contested by both FEMA and the Defendant intervenors, does not  
14 demonstrate that FEMA's compliance program fails to satisfy the RPA. Instead, the evidence  
15 offers a running commentary about Element 3's lack of clarity, and it shows that the  
16 development standards were not tailored to help communities understand their NFIP and ESA  
17 compliance obligations.

18       The Court recognizes that the question of whether individual communities have met their  
19 compliance obligations through FEMA's oversight is both important and controversial. It also  
20 recognizes that FEMA's compliance program has been modified throughout this litigation to  
21 better meet NMFS's expectations, and to respond to allegations of perceived community non-  
22 compliance that Plaintiff identified through discovery. *See, e.g.*, Dkt. # 88, Riebau Decl., ¶ 48  
23 (stating in response to Hassleman Decl at ¶ 24's allegation that Skagit County issued permits  
24

1 without requiring habitat assessments, “I have contacted Skagit County and requested a full  
2 explanation of what [the identified development permits] are for, confirmation that they involved  
3 land-disturbing activities, and a description of the steps taken to ensure that issuing the permits,  
4 either individually or cumulatively, caused no adverse effect to salmon habitat”). However, the  
5 Court’s role under the APA standard, where no party has brought suit against NMFS and the  
6 BiOp, is to measure FEMA’s compliance against the language of BiOp. By not defining a  
7 comprehensive compliance scheme, the BiOp gave discretion to FEMA to fashion a workable  
8 program. Having fully considered the scope of FEMA’s 3 Door compliance program, its  
9 guidance documentation, and its enforcement procedures, the Court finds that NWF has failed to  
10 meet its burden to show that under Element 3, FEMA’s implementation of the 3 Door  
11 compliance program was an abuse of discretion, arbitrary or capricious, or not in accordance  
12 with the law.

13 2. RPA Element 2: Mapping

14 In its motion, NWF identifies two primary concerns with FEMA’s compliance with RPA  
15 Element 2. First, NWF contends that FEMA’s procedure for processing Letters of Map Revision  
16 encourages communities to add fill to existing floodplain to map those areas out of the  
17 designated floodplain. Second, NWF argues that FEMA has failed to timely update its maps for  
18 accuracy and to account for future climate change.

19 a. *Sub-Element 2.A*

20 Sub-Element 2.A states in pertinent part as follows:

21 The FEMA shall process Letters of Map Change caused by manmade  
22 alterations only when the proponent has factored in the effects of the  
23 alterations on channel and floodplain habitat function for listed salmon,  
and has demonstrated that the alteration avoids habitat functional changes,  
or that the proponent has mitigated for the habitat functional changes

1 resulting from the alteration with appropriate habitat measures that benefit  
2 affected salmonid populations. The FEMA will ensure that effects from  
3 habitat alterations that are reasonably certain to occur but might occur  
4 later in time, such as changes in storm water quantity, quality, and  
5 treatment, decreased riparian vegetation, lost large woody debris,  
6 increased bank armoring, and impaired channel migration, are also  
7 mitigated. The FEMA will report to NMFS on the results of mitigation for  
8 manmade floodplain changes that become the basis for map revision  
9 requests.

10 BiOp at 152.

11 FEMA periodically revises its FIRMs by making corrections through Letters of Map  
12 Revisions (“LOMRs”) or Letters of Map Amendments (“LOMAs”), collectively referred to as  
13 LOMCs. Dkt. # 17, Carey Decl., ¶ 29 (citing 42 U.S.C. § 4104(f), (h) and 44 C.F.R. Parts 70,  
14 72). A LOMR is used to modify a FIRM where “physical measures that affect the hydrologic or  
15 hydraulic characteristics of a flooding source” are implemented, which “result in the  
16 modification of the existing regulatory floodway, the effective base flood elevation, or the  
17 SFHA.” 44 C.F.R. § 72.2. Importantly, FEMA grants LOMR requests for projects that have  
18 already been implemented. It “does not authorize, permit, fund, license, zone or otherwise  
19 approve construction of any projects in the floodway” for which LOMRs are requested. Dkt. #  
20 17, Carey PI Decl., ¶ 30.

21 FEMA may issue LOMRs for projects that involve using fill to modify the SFHA. These  
22 are referred to as “LOMR-Fs.” *Id.* at 31. “The LOMR-F documents the fact that the property is  
23 no longer subject to the 1% annual chance of flooding due to the risk reduction measures taken  
24 so the property is now outside the SFHA.” *Id.* The BiOp determined that the practice of using fill  
to remove property from the SFHA posed a risk to salmon recovery efforts in certain regional  
locations. *See* BiOp at 133 (“[t]he NFIP requirements that fill be placed to the BFE in order to

1 | elevate buildings, [and] that fill above the BFE is a foundation for being removed from the  
2 | mapped floodplain, . . . create habitat and adjacent watershed conditions in opposition to  
3 | [salmon] recovery projects and elements”). It also stated that “[p]lacing fill to elevate properties .  
4 | . . . [is] detrimental to floodplain and channel function.” *Id.* at 85. The BiOp recognized that  
5 | FEMA’s endorsement of using fill to map an area out of the floodplain, and thus out of the  
6 | NFIP’s insurance requirements, created an incentive for “individuals to remove their property  
7 | from regulation by artificially filling it.” *Id.* at 84. NWF contends that because FEMA continues  
8 | to process LOMRs and LOMR-Fs without independently assessing whether the project will  
9 | adversely affect critical habitat, the incentive to remove property from the floodplain remains.

10 |       There are two pathways for property owners to obtain a LOMR that is approved by  
11 | FEMA. Property owners may either (1) apply for a LOMR from FEMA for a project that has  
12 | already been completed, or (2) seek a Conditional Letter of Map Revision from FEMA  
13 | (“CLOMR” and “CLOMR-Fs”), which requires that the property owner demonstrate ESA  
14 | compliance prior to obtaining FEMA’s approval. FEMA implemented Procedure Memorandum  
15 | 64 (AR 2310-2316) to comply with the RPA for the CLOMR process. CLOMRs are requested  
16 | for a project before any floodplain modification occurs. FEMA now mandates that

17 |       [t]he CLOMR-F or CLOMR request will be processed by FEMA only  
18 | after FEMA receives documentation from the requestor that demonstrates  
19 | compliance with the ESA. The request must demonstrate ESA compliance  
20 | by submitting to FEMA either an Incidental take Permit, Incidental Take  
21 | Statement, “not likely to adversely affect” determination from [NMFS and  
22 | FWS] or an official letter from [NMFS and FWS] concurring that the  
23 | project has “No Effect” on listed species or critical habitat. If the project is  
24 | likely to cause jeopardy to listed species or adverse modification of critical  
25 | habitat, then FEMA shall deny the conditional LOMC request.

26 | AR 2310-2316.

1 NWF challenges FEMA's approval of LOMRs because, unlike the CLOMR process, the  
2 LOMR process does not require FEMA to independently evaluate ESA compliance and act in  
3 consultation with NMFS. Thus, NWF believes that the LOMR process allows property owners to  
4 pursue floodplain alterations without demonstrating ESA compliance. NWF wants FEMA to  
5 either "require analysis before the fact, or [require] adequate mitigation later." Dkt. # 74, p. 20.  
6 Because FEMA only "reminds" communities about their obligations to comply with the ESA  
7 when processing LOMRs, NWF contends that the LOMR process encourages the "cumulative  
8 degradation of habitat and the critical point of RPA #2." *Id.* at p. 21.

9 FEMA contends that the LOMR process adequately protects against habitat degradation  
10 because the permitting process ensures that only RPA Element 3-compliant projects will obtain  
11 development permits. FEMA believes that the permitting process offers an independent route for  
12 RPA compliance such that it does not have to alter how it approves LOMRs because if a  
13 community has obtained an ESA-compliant permit, there is no need for FEMA to re-assess ESA  
14 compliance before granting the LOMR. Because FEMA believes that it is in compliance with  
15 RPA Element 3, it believes that it has complied with RPA Element 2.A.

16 As discussed above, FEMA's implementation of the 3 Door approach to satisfy RPA  
17 Element 3 was not arbitrary and capricious. The language of Element 2.A places the burden of  
18 demonstrating that the proposed floodplain alteration avoids functional alterations squarely on  
19 the proponent requesting the LOMR. Under its 3 Door approach, FEMA requires that all  
20 proposed land development permits that affect the floodplain meet the "no adverse effects" test.  
21 In that sense, and contrary to NWF's assertions, FEMA's process requires "before-the-fact"  
22 assessment of adverse affects, and allows for NMFS to identify potential mitigation actions.  
23 FEMA has shown that it considered the issues identified by the BiOp related to LOMCs,

1 changed its procedures with respect to the CLOMR process, and changed its permit reporting  
2 and compliance procedures to capture floodplain alteration projects for which CLOMRs would  
3 be requested. NWF has therefore failed demonstrated that FEMA's approach to Element 2.A was  
4 arbitrary and capricious.

5 *b. Sub-Element 2.C*

6 Sub-Element 2.C concerns updating floodplain modeling to generate accurate floodplain  
7 maps and states as follows:

8 The FEMA shall ensure that floodplain modeling incorporates on-the-  
9 ground data to increase the accuracy of maps depicting the floodplain. For  
10 multi-thread channels, FEMA shall produce and distribute a Technical  
11 Bulletin recommending the use of unsteady state hydraulic models to map  
the boundaries of the 100-year floodplain. In addition, FEMA will use a 2-  
dimensional model in estuarine floodplains and in other areas where  
applicable.

12 The FEMA will also revise map modeling methods to consider future  
13 conditions and the cumulative effects from future land-use change, to the  
14 degree that such information is available (e.g. zoning, urban growth plans,  
USGS Climate study information[]). Future conditions considered should  
15 include changes in the watershed, its floodplain, and its hydrology; climate  
16 change, and other conditions that affect future flood risk. The FEMA shall  
ensure that jurisdictions use anticipated future land use changes when  
conducting hydrologic and hydraulic calculations to determine flood  
elevations.

17 BiOp at 152. NWF contends that FEMA has improperly delegated its obligation to update its  
18 maps on the individual communities. It believes that FEMA has merely advised communities  
19 about updating maps for informational purposes and has failed to offer useful guidance on  
20 mapping for future climate change. Although FEMA has been conducting a draft national study  
21 on the impact of climate change on floodplain habitat, the draft was only very recently  
22 completed. NWF states that "[i]n sum, FEMA has vacillated between claiming it lacks authority  
23

1 to consider future conditions, and arguing that RPA #2 doesn't require it to do anything to  
2 address map accuracy at all." Dkt. # 74, p. 23.

3 FEMA believes that it is in compliance. Element 2.C requires FEMA to (1) ensure that  
4 floodplain modeling incorporates on-the-ground data and issue a Technical Bulletin, (2) revise  
5 its modeling methods to consider future conditions and cumulative effects of land-use change,  
6 and (4) ensure that jurisdictions use anticipated future land-use changes when calculating flood  
7 elevations.

8 FEMA contends that its FIRMs cannot currently be updated to include future conditions  
9 because the FIRMs must actuarially reflect the current risk of flooding in NFIP communities. 42  
10 U.S.C. § 1401; see also 44 C.F.R. § 65.6(a)(3) ("revisions . . . cannot be made based on the  
11 effects of proposed projects or future conditions"). FEMA also believes that passage of the  
12 Biggert-Waters Flood Insurance Reform Act of 2012 overrides the entire process by which it  
13 would analyze and adopt map revisions. *See* Dkt. # 112, Carey SJ Reply Decl., ¶ 44. The Act  
14 required creation of a Technical Mapping Advisory Council to address NFIP mapping reform.  
15 *Id.* The advisory council is required to recommend

16 (1) procedures to cost-effectively improve accuracy, general quality,  
17 performance metrics, and other aspects of preparing Flood Insurance Rate  
18 Maps (FIRMs); (2) mapping standards and guidelines for FIRMs; (3) map  
19 maintenance; (4) delegation of mapping activities to State and local  
20 mapping partners; (5) improving interagency and intergovernmental  
21 coordination and leveraging; and (6) submitting an annual report to the  
22 FEMA administrator that contains a description of annual activities, and  
23 evaluation of the status and performance of FIRMs and mapping activities  
24 to revise and update FIRMs, and a summary of recommendations.

21 *Id.* at ¶ 45. The advisory council must also "consult with scientists and technical experts, other  
22 Federal agencies, States, and local officials to develop recommendations regarding consideration  
23



1 of future conditions” and it is required “to prepare a separate report . . . that will contain  
 2 recommendations regarding the treatment of future conditions within the context of the NFIP.”  
 3 *Id.* at ¶ 46. Plaintiff has failed to show that FEMA’s reliance on the provisions of the Biggert-  
 4 Waters Act, which governs the revision of NFIP FIRMs and includes the future conditions  
 5 assessment required by the BiOp, is unreasonable or arbitrary and capricious.

6 *c. Sub-Element 2.D*

7 Sub-Element 2.D requires FEMA to “encourage communities to evaluate and identify the  
 8 risk of flooding behind 100 year levees based on anticipated future conditions and the cumulative  
 9 effects from future land-use change.” BiOp at 152. FEMA believes that it has complied with this  
 10 sub-element in full. In April, 2009, FEMA published a fact sheet to inform property owners of  
 11 the residual risk associated with living behind levees. *See* Fact Sheet: Living Behind Levees, AR  
 12 2204-2205. This Fact Sheet provides information about levee systems for homeowners, business  
 13 owners, and other citizens who live and work on levee-impacted areas. Additionally, FEMA  
 14 participated in developing the National Committee on Levee Safety’s report to Congress  
 15 recommending that a National Levee Safety Commission be established. *See* Report by National  
 16 Committee on Levee Safety, AR 2208-2309; *see also*  
 17 [http://www.leveesafety.org/ip\\_FinalProgress\\_on\\_Recommendations\\_21July11.cfm](http://www.leveesafety.org/ip_FinalProgress_on_Recommendations_21July11.cfm). FEMA also  
 18 states that future-conditions flood hazard information will be provided at the community’s  
 19 request for the community’s use in regulating floodplain development. *See* 44 C.F.R. § 64.3.  
 20 [Dkt. # 17, Carey PI Decl. at ¶ 64]. Plaintiff has not shown that FEMA’s guidance to  
 21 communities on this sub-element fails to satisfy Element 2.

22 3. RPA Element 5: Levee Vegetation and Construction

23 RPA Element 5 addresses the relationship between FEMA’s program and the

1 maintenance of levees and certain kinds of other construction. Sub-Element 5.A requires FEMA  
2 to “*not* recognize levees certified by the Army Corps of Engineers under its levee vegetation  
3 certification standards *unless* it has been demonstrated that the vegetation standard will not  
4 adversely affect species or their habitat.” BiOp at 160. Sub-Element 5.B requires FEMA to  
5 revise its procedure memoranda to reflect that levee owners who have been disqualified from  
6 Corps repair funding (for failure to abide by the Corps’ vegetation standards) will remain eligible  
7 for FEMA emergency funding if the levee is certified by a professional engineer. *Id.* Sub-  
8 Element 5.D requires that FEMA recognize new levees and floodwalls only when certain criteria  
9 are met. *Id.* at 161. NWF contends that FEMA has improperly refused to implement 5.A, B, and  
10 D by stating that implementation is beyond its authority.

11 FEMA states that it “does not design, construct, fund, or approve levee systems or  
12 floodwall systems. Rather, FEMA’s role is to determine if the levee owner has submitted proof  
13 to show that a levee provides protection from the one-percent-annual-chance flood.” Dkt. # 31, p.  
14 48 (citing 44 C.F.R. § 65.10). For 5.A FEMA contends that it lacks authority to decline to  
15 recognize Corps-certified levees under 44 C.F.R. § 65.10(e). It also states that it has not  
16 recognized a Corps’ certified levee since the BiOp was issued. *See* Dkt. # 86, Carey SJ Decl., ¶  
17 190. For 5.B, FEMA contends that emergency funding issues are types of assistance provided  
18 under a different program than the NFIP and therefore 5.B should not have been included in the  
19 RPA. Moreover, it contends that it lacks statutory authority to provide disaster assistance to any  
20 entity that is eligible for assistance under another federal program. This means that if a person is  
21 eligible for, but denied Corps’s emergency funding, FEMA may not provide emergency funding  
22 as per 42 U.S.C. § 5155(c). Further, FEMA states that it is not aware of any levee owners who  
23 were denied flood damage repair funding on this basis. *See* Dkt. # 86, Carey SJ Decl., ¶ 193. For  
24

1 5.D, FEMA argues that any levee construction or development is subsumed under Element 3's  
2 permitting process.

3 In its February 3, 2012 letter to FEMA, NMFS commented as follow:

4 Your January 25th letter explains that FEMA is unable to implement  
5 certain portions of Element 5 of the RPA because its substance is outside  
6 FEMA's authority. NMFS believes the conditions specified in Element 5  
7 are essential to recovery of listed salmonid species in western Washington,  
8 and understands that these issues continue to be contentious both locally  
9 and nationally. However, NMFS believes that there are better venues  
10 among federal agencies to address implementation of the standards  
11 contained in this Element and is actively engaged with FEMA and the  
12 Corps of Engineers in those efforts. . . . We are also pleased that FEMA is  
13 providing guidance to local jurisdictions with "Levee Vegetation and  
14 Mapping" and Procedural Memoranda 63 and 64. It is NMFS  
15 understanding, that Region X will require new levees to be evaluated with  
16 a Conditional Letter of Map Revision (CLOMR) process that includes a  
17 Section 7 consultation.

18 Supp. A.R. at 8. Considering NMFS's statement that "there are better venues among federal  
19 agencies to address implementation of the standards contained in [Element 5]" with FEMA's  
20 interpretation of its statutory authority, the Court cannot say that FEMA's implementation of  
21 Element 5 was an abuse of discretion or arbitrary and capricious.

#### 22 4. RPA Element 6: Floodplain Mitigation Activities

23 Element 6 states in relevant part as follows:

24 For any development actions in floodplains proceeding consistent with  
current NFIP requirements, that occur during the period prior to full  
implementation of RPA elements 2, 3, and 5 [sic], and that degrade  
channel or floodplain habitat in NFIP communities (including from the  
indirect effects of development in the floodplain), and for any  
development for which FEMA, in coordination with NMFS pursuant to  
RPA 3 finds that additional mitigation is necessary, FEMA shall ensure  
that appropriate mitigation occurs. For example, FEMA may assist in  
floodplain mitigation/restoration activities as identified in the PS recovery  
plan, via contribution of financial, technical, or physical (labor or  
equipment) support.

1 BiOp at 161. NWF contends that all FEMA has done to discharge its obligation under Element 6  
2 is provide guidance and technical advice to communities that is untethered from a specific  
3 mitigation effort. It contends that there have been no mitigation or restoration activities to offset  
4 the harm of floodplain development activities that have occurred since the BiOp was issued.

5 FEMA contends that by providing technical assistance to communities, it has satisfied  
6 Element 6 by its plain terms. FEMA also points out that the reporting process that was  
7 implemented under Element 3 is the primary vehicle for identifying permitted projects that  
8 require mitigation. FEMA reports to NMFS annually for a determination about whether  
9 mitigation efforts may be necessary for any particular project. FEMA notes that NWF has failed  
10 to identify a single instance where NMFS required a specific mitigation plan for a project that it  
11 was asked by FEMA to review.

12 FEMA provided technical assistance to communities in the form of training, public  
13 outreach, preparing guidance documents, community consultations, a dedicated website,  
14 organizing conferences and workshops, and participating in an intergovernmental salmon  
15 coalition. Dkt. # 17, Carey PI Decl, ¶¶ 157-171. It procured funding to acquire 25 flood-prone  
16 properties for conversion to open space. *Id.* at ¶¶ 144-49. And in 2012, FEMA conducted 26  
17 community assistance visits (“CAVs”) to help communities understand their obligations under  
18 the BiOp. *Id.* at ¶ 206. NMFS staff attended 21 of the 26 meetings. *Id.* While Plaintiff contends  
19 that such measures are inadequate, the record fails to show that NMFS, the agency tasked with  
20 identifying mitigation opportunities in the BiOp, ever told FEMA that mitigation was required to  
21 offset the adverse effects of a specific development project. Thus, Plaintiff has not shown that  
22 FEMA has failed to implement Element 6.

1    5.    RPA Element 7: Monitoring and Adaptive Management

2            Element 7 requires FEMA to report to NMFS annually. It provides that upon review of  
3 FEMA's annual reporting, "NMFS will determine, in coordination with FEMA, if some alternate  
4 actions or additional changes in RPA elements are needed to avoid jeopardy and adverse  
5 modification of critical habitat." BiOp at 162. It further states that "[i]f NMFS determines that  
6 adverse effects to channel and floodplain habitat were not avoided or not mitigated as a result of  
7 NFIP actions, FEMA will ensure that mitigation . . . is provided . . . ." *Id.* This element "is only  
8 checking on implementation of the program as it moves toward addressing more specifically the  
9 primary effects of the mapping and minimum criteria elements of the program on listed salmon  
10 and steelhead." *Id.* at 163.

11            To implement Element 7, FEMA first notified communities that they would be required  
12 to report development permitting activity to FEMA. Dkt. # 86, Carey SJ Decl., ¶ 210. FEMA  
13 then created and issued its NFIP-ESA "Reporting Tool," which was later revised to include  
14 additional information. *Id.* at ¶ 211; *see also* SSAR 189. FEMA transmitted annual reports to  
15 NMFS as it was required to do. Carey Decl., ¶¶ 209-14. The record demonstrates that FEMA and  
16 NMFS were engaged in the review process and that NMFS recommended changes to the  
17 Reporting Tool that FEMA then incorporated. *See* AR 1643. This back-and-forth communication  
18 between the agencies was expressly contemplated by the plain language of Element 7. Plaintiff  
19 has therefore failed to show that FEMA failed to comply with Element 7's reporting obligation.

20  
21            **VIII. CONCLUSION**

22            NWF's challenges target the actions FEMA has taken to implement the RPA. FEMA has  
23 demonstrated through the record why it believes that it has either complied with the RPA or why

1 it lacks statutory authority to fully implement sub-elements of the RPA. The Court has  
2 considered what the BiOp specifically requires of FEMA; what FEMA has done to implement  
3 the BiOp; whether the NFIP satisfies the directives of the BiOp; and if the NFIP failed to satisfy  
4 a particular RPA element, whether FEMA has articulated a rational basis for deviating from the  
5 RPA. The Court concludes that Plaintiff has failed to demonstrate that FEMA's implementation  
6 of the NFIP in the Puget Sound Region was an abuse of discretion or arbitrary and capricious  
7 under the plain terms of RPA.

8 Having considered the motions, the responses and replies thereto, the declarations and  
9 attached exhibits, and remainder of the record, the Court hereby finds and ORDERS:

- 10 (1) Plaintiff's Motion for Summary Judgment (Dkt. #74) is DENIED;  
11 (2) Defendant FEMA's Motion for Summary Judgment (Dkt. #84) is GRANTED;  
12 (3) Defendant Intervenor Cities Response/cross Motion (Dkt. #92) is GRANTED on the  
13 grounds discussed above;  
14 (4) The Clerk is directed to enter judgment in favor of Defendant FEMA.

15 DATED this 23<sup>rd</sup> day of October 2014.

16 

17 RICARDO S. MARTINEZ  
18 UNITED STATES DISTRICT JUDGE  
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